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IN THE

Supreme Court of the United States

No. 70-5025

FRANCIS HAINES,
Petitioner,

v.

OTTO J. KERNER, FORMER GOVERNOR,
STATE OF ILLINOIS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondents, as expected, have taken the position that the action taken against Haines "was necessary to the maintenance of proper prison discipline and security." R. Br., at 8. In their attempt to support this unproven assertion, they speculate that Illinois prisoners might abuse such basic implements of personal hygiene as soap, towel, toothbrush and a bed. R. Br., at 37. It is further suggested that the State of Illinois may not be able to afford a more humane system of prison discipline. R. Br., at 38.

Significantly, no evidence has yet been introduced to show whether or not this *particular* prisoner would have misused the rudimentary essentials of decency. Cf. *Wright v. McMann*, 387 F.2d 519, 526 n. 15 (2d Cir. 1967). To deny these necessary items to all persons as a matter of course is to act arbitrarily, without rational basis, and in direct threat to inmate health—hardly a legitimate state interest. And, as the Eighth Circuit observed, in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." Id., at 580.

No showing has been made by Illinois officials that the use of more human alternatives, which are employed in many, if not most, other jurisdictions,[1] would be inadequate to preserve good order and discipline in Illinois prisons. In the final analysis, respondents seek refuge in the discredited "hands-off" doctrine, in order to avoid any judicial scrutiny of their patently inhumane practices.

At a minimum, prison officials must adopt "appropriate safeguards" surrounding the use of punitive techniques which pose a danger to human health. *Talley v. Stephens*, 247 F. Supp. 683, 689 (E.D. Ark. 1965). The instant record fails to reveal any Department of Correction regulations providing for adequate supervision by higher officials over lower echelon custodial personnel, cf., *Landman v. Peyton*, 370 F.2d 135, 141 (4th Cir. 1966), cert. denied, 388 U.S. 920 (1967), or requiring that due consideration be given to an inmate's physical health in connection with the use of onerous solitary confinement, or requiring some administrative finding, reviewable by a Warden or Deputy Warden, that a particular prisoner might abuse articles of personal hygiene, before such materials are deliberately withheld from him.

[1] As of the filing of this Reply Brief for Petitioner, twenty eight states had responded to our questionnaire concerning conditions of solitary confinement, with the following results:

a) 24 states responded that they still made use of solitary confinement; 4 replied that they had abandoned this practice.

Moreover, as the experience of the Eighth Circuit indicates, *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), the use of precautionary conditions may still be insufficient to save certain practices, which are so contrary to contemporary standards[2] of decency and humanity, either generally or as applied in a particular case as here, that they would constitute cruel and unusual punishment per se.

Respondents have referred to the Manual of Correctional Standards issued by the American Correctional Association, and have apparently conceded that cells should not be completely dark[3] and that acceptable sanitary conditions should be maintained. R. Br. at 35. But, they have overlooked the following instructive passages:

> "It is a major disciplinary measure, which can have damaging effect on some inmates, and should be judiciously used when other forms of action prove inadequate. . .
>
> Few will deny that there are some prisoners who need to be segregated for a time under *humane* conditions, to permit them to settle down after expressions of uncontroled rage, or for other reasons. But to use it as a standard disciplinary action for almost the entire range of offenses is hardly a solution to

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b) All 24 states used lighted cells.

c) All 24 provided mattresses and 20 of 24 provided beds.

d) 22 of 24 provided soap; 21 of 24 provided a towel; 21 of 24 provided other elements of personal hygiene.

e) 21 of 24 allowed shave and shower at least weekly.

f) 14 of 24 provided weekly exercise; 9 of these daily.

g) 21 of 24 provided visits by a physician.

[2]Compare, *Roth v. United States*, 354 U.S. 476 (1957) ("Contemporary Community Standards" test for obscenity).

[3]Respondents' hairsplitting contention that petitioner "did allege that his cell was dark, but not completely without light," R. Br., at 38, hardly accords the liberal construction which, as respondents previously acknowledged, R. Br., at 22 n. 20, is due pro se prisoner complaints.

disciplinary problems. . . .(emphasis added). MANUAL, at 412-13.

CONCLUSION

Respondents' failure to give specific reasons for the uncivilized treatment of the petitioner in this case, compounded by their apparent lack of adequate procedural safeguards surrounding the infliction of this type of solitary confinement in Illinois, demonstrates the need for judicial scrutiny of such low visibility decisions, which are dangerous to inmate health, which constitute cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

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*Counsel wishes to acknowledge with appreciation the able assistance in the preparation of this Reply Brief of Steven Burton, Columbia Law School, Class of 1971.